# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 317.

THE DAY-BRITE LIGHTING, INC.,
Appellant,
vs.
STATE OF MISSOURI.

Appeal from the Supreme Court of the State of Missouri.

## APPELLANT'S STATEMENT, BRIEF AND ARGUMENT.

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II.

### DECISIONS OF COURTS BELOW.

A. State v. Day-Brite Lighting, Inc., 220 S. W. 2d 782, St. Louis Court of Appeals, 1949 (R. 25).

B. State v. Day-Brite Lighting, Inc., 240 S. W. 2d 886, Mo. Sup., 1951 (R. 37).

III.

### JURISDICTIONAL STATEMENT.

Jurisdiction of this Court was invoked under the provisions of Section 1257 (2), Title 28, United States Code Annotated, Chapter 646, 62 Stat. 929, which provides that

final judgment rendered by the highest Court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States by appeal where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

Appellant's Motion for a Rehearing was overruled by the Supreme Court of Missouri on July 9, 1951 (R. 66). The Order Allowing Appeal was entered on August 14, 1951 (R. 73). This Court noted probable jurisdiction on November 5, 1951 (R. 75). Appellant has hitherto filed its printed Statement as to Jurisdiction.

## IV.

## STATEMENT OF FACTS.

The Appellant, Day-Brite Lighting, Inc., was charged on June 25, 1947, in an information filed by the Prosecuting Attorney of the City of St. Louis, Missouri, with having violated the provisions of Section 11785, R. S. Mo. 1939. This statute, which since the 1949 revision of the Missouri statute has become Section 129.060, R. S. Mo. 1949, Vol. 1, page 1253 (the statute was not changed by the revision), reads as follows:

> "Any person entitled to vote at any election in this state shall, on the day of such election, be entitled to absent himself from any services or employment in which he is then engaged or employed, for a period of four hours between the times of opening and closing the polls; and such voter shall not, because of so absenting himself, be liable to any penalty: provided, however, that his employer may specify the hours during which such employee may absent himself as aforesaid. Any person or corporation who shall refuse to

any employee the privilege hereby conferred, or shall discharge or threaten to discharge any employee for absenting himself from his work for the purpose of said election, or shall cause any employee to suffer any penalty or deduction of wages because of the exercise of such privilege, or who shall, directly or indirectly, violate the provisions of this section, shall be deemed guilty of a misdemeanor, and on conviction thereof be fined in any sum not exceeding five hundred dollars."

The information was in two counts. Count I charged that on an election day (November 5, 1946) the appellant refused to allow an employee, one Grotemeyer, who was entitled to vote in the election, to absent himself from his employment for a period of four hours between the opening and closing of the polls contrary to the provision of the statute. Count II charged that appellant penalized an employee, Grotemeyer, by deducting from his salary the amount of his earnings for the time he was absent from his work, and that Grotemeyer, an employee and qualified voter, was entitled to absent himself from his work and employment for four hours between the opening and closing of the polls without penalty of deduction of wages because of exercising such privilege, and that such penalty was contrary to the provision of the statute (R. 3-4).

Prior to the first trial appellant filed a Motion to Quash the Information on various constitutional grounds as more fully hereafter set out. The trial court sustained the Motion to Quash Count II and overruled the Motion to Quash Count I (R. 25).

The matter proceeded to trial on Count I, and the appellant was found guilty of failing to allow the said Grotemeyer, an employee who was entitled to vote, the privilege of absenting himself for a period of four hours from his scheduled work-day (8:00 A. M. to 4:30 P. M.) on election day.

Appellant appealed from this conviction, and the State appealed from the sustained Motion to Quash Count II of the Information. These appeals were taken to the Supreme Court of Missouri and there transferred to the St. Louis Court of Appeals. The reason for said transfer appears in the reported decision of the St. Louis Court of Appeals, State v. Day-Brite Lighting, Inc., 220 S. W. Reporter 2nd 782 (R. 25, 27 and 28).

The St. Louis Court of Appeals reversed outright the conviction of appellant on Count I, and also reversed the judgment quashing Count II of the Information and remanded the cause for trial upon Count II (R. 33).

After the matter was remanded to the trial court appellant again filed a Motion to Quash Count II of the Information (R. 5), which the Court overruled on October 13, 1949. The matter then proceeded to trial upon an agreed Stipulation of Facts (R. 8, 9).

The facts as stipulated were, briefly, as follows:

Appellant was a Missouri Corporation, operating a plant in St. Louis, Missouri, engaged in production of goods that moved in interstate commerce (R. 9); that November 5, 1949, was a day for a general election in St. Louis and the State of Missouri; that the polls were open from 6:00 A. M. to 7:00 P. M. (R. 9); that appellant employed one Fred C. Grotemeyer, a duly qualified voter entitled to vote in said election (R. 9); that he had been employed by appellant for some five years and was a member of Local No. 1, I. B. E. W., which had a contract with appellant covering wages, hours and other working conditions (R. 9); that at that time Grotemeyer worked a shift from 8:00 A. M. to 4:30 P. M. with thirty minutes off for lunch, and was paid on an hourly basis at the rate of $1.60 per hour (R. 9); that the day preceding the election Grotemeyer requested a four-hour period from the scheduled work day the next day to

vote and such permission was refused (R. 9); that Grotemeyer, under the Union contract, was required to report for work at 8:00 A. M.; that appellant furnished a set of rules and regulations for its employees; that these rules provided that no employee should be absent from work without permission, except in cases of sickness or emergency, and that then he must report such reason (R. 10); that on the day preceding the election day appellant posted a notice allowing all employees, including Grotemeyer, to take time off for voting at 3:00 o'clock in the afternoon, which would be one and one-half hours earlier than the said Grotemeyer regularly got off work and which gave him four consecutive hours in which to vote during the time the polls were open (R. 10).

The stipulation further set out that Grotemeyer lived about two hundred feet from the polling place in which he voted; that he left work at 3:00 o'clock; that he voted at about 5:00 o'clock in the afternoon, taking five minutes to do so (R. 10); that he wanted four hours from his scheduled work day to campaign, to vote, and to get out the vote; that four hours were not necessary; that it only took him about twenty minutes to get from his home to his work (R. 10); that Grotemeyer was paid by appellant on the day in question for only the six and one-half hours actually worked, namely, from 8:00 A. M. to 3:00 P. M., less thirty minutes for lunch; that he was not paid for the hour and a half from 3:00 P. M. to 4:30 P. M. ordinarily included in his scheduled work day, during which period he did no work for appellant, and that the plant could not operate if all employees were given four hours from the scheduled work day to vote (R. 10).

The Stipulation continued that one Jacobs, International Vice President of the I. B. E. W., would testify as to the Union contract; that he had discussed on the day prior to the election, with appellant's representatives, the question

of Union members being allowed four hours off from their normally scheduled work day to vote and with pay for the time not worked (R. 10, 11); that Jacobs had been active in organized labor for thirty years; that he was familiar with its history in the State; that one of the desirable changes obtained by labor unions was a shortening and decrease in the number of hours worked per day (R. 11); that from his research the average work day fifty years ago in Missouri was 14 to 16 hours; that it had been at least 10 hours in his Union; that the average work day now was 8 hours, and that no demand had ever been made by the Union before for four hours off of the scheduled work day on election day, with pay from appellant, prior to the election day in question (R. 11).

This was all the evidence on behalf of the State and Defendant demurred to the evidence, which the Court overruled (R. 21).

The Stipulation further showed that Klingsick, appellant's Vice President, Treasurer and General Manager, would testify on appellant's behalf that it had 158 employees working on an average hourly rate of $1.089 from 8:00 A. M. to 4:30 P. M.; that 58 employees worked at an average hourly rate of $1.03 from 7:00 A. M. to 3:30 P. M. and 7 employees worked at an average hourly rate of $.8646 from 7:00 A. M. to 3:00 P. M.; that if all employees took four hours off from the scheduled work day to vote their pay for that period would be $951.42 and that appellant would have an additional production loss of $7,138.00; that he wrote the rules and regulations for employees (R. 11), and that he had dictated the notice as to the time off the employees could take to vote (if they desired to absent themselves); and that the hour of 3:00 o'clock in the afternoon was arrived at because that time could give the employees four consecutive hours in which to vote before the polls closed (R. 11).

Concerning the two Union contracts Klingsick, by Stipulation, testified that the said Union contracts governed the relations between appellant and most of its employees; that under the contracts, wages were paid only for each hour worked at an hourly rate; that a work week consisted of 40 hours divided into five 8-hour days; that the employees contracted under the Union contracts to be on the job, ready for work at the scheduled starting time and to continue to work until the scheduled quitting time during the normal work day (R. 12).

It was also stipulated that Appellant would offer proof as to the financial loss to all employers in the State if all employees should be given four hours off with pay on election day. The Court having sustained the State's objection to this testimony, Appellant made an offer of proof showing that in April, 1949, there were 330,600 hourly-paid employees engaged in the manufacturing industry, receiving therefor an average hourly rate of $1.302 and that there were some 729,600 employees in non-manufacturing industries for which a figure, showing the hourly rate, was not available, and that those figures did not include agricultural employees (R. 12).

This was all the testimony on behalf of either party and at its close Appellant again demurred and the Court overruled the demurrer (R. 21) and found Appellant guilty as charged in Count II of the Information and fined it $100.00 (R. 13). In due course, after the Court had overruled the Motion for a New Trial (R. 18), an appeal was taken to the Supreme Court of Missouri (R. 24).

Appellant urged in its Motion for a New Trial (R. 13) exactly the same grounds urged in its Motion to Quash the Information (R. 5). Those that need concern us here were briefly that the statute violated Section I of the Fourteenth Amendment to the Federal Constitution by depriving Appellant of his property without due process of law; that it

violated Section I of the Fourteenth Amendment by denying Appellant equal protection of the laws; and that it impaired the obligation of contracts in contravention of Section 10, Article I, of the United States Constitution. These contentions which are set out fully in the Argument are found in Paragraphs 3, 6, and 8 of the Motion to Quash the Information (R. 5, 6) and the same paragraphs of the Motion for a New Trial (R. 14, 15).

The matter was argued before Division 1 of the Supreme Court of Missouri with Appellant urging the Federal Constitution grounds above set out (R. 40, 46 and 47) and the Division upheld Appellant's Conviction (R. 35) and the Constitutionality of the Statute (R. 48).

On proper motion filed (R. 35) the matter was transferred to the Court en banc on Dec. 11, 1950 (R. 36). The Court en banc sustained the finding of Division 1 on June 11, 1951 (R. 36) and adopted the opinion as filed in Div. 1. The decision was 4-3 with 2 dissents written (R. 50, 53).

Thereafter, on June 26, 1951, Appellant filed its Motion for a Rehearing which was by the Court overruled on July 9, 1951 (R. 66). The Supreme Court on proper motion by Appellant stayed the filing of the mandate in the trial court pending this appeal (R. 66).

Appellant filed its Petition for Appeal to the Supreme Court of the United States from the Supreme Court of Missouri on Aug. 14, 1951, with the Clerk of the Supreme Court of Missouri together with its Appeal Bond, Assignment of Errors, Statement of Points to Be Relied Upon and Jurisdictional Statement. The order allowing the appeal was entered the same date (R. 73). Probable jurisdiction was noted by this court on Nov. 9, 1951, and the matter docketed for Argument (R. 75).

## V.

## SPECIFICATION OF ASSIGNMENT OF ERRORS.

Appellant filed on August 14, 1951, an Assignment of Errors with its petition for appeal (R. 70). This Assignment of Errors was adopted by Appellant as its Statement of Points to Be Relied Upon on October 15, 1951 (R. 74).

The specific errors assigned therein that are hereafter urged in this brief are as follows:

> "1. In said suit there was drawn in question the validity of a statute of the State of Missouri numbered 11785, R. S. Mo. 1939, Vol. II, page 3071 (the said section being then and there part of an Act known as the 'Corrupt Practices in Election Act' and the particular subsection, namely, Section 11785, R. S. Mo. 1939, being entitled 'Employees to be allowed four hours [to vote]—penalty, etc.,' approved in 1897), on the grounds that it was repugnant to the Constitution of the United States and specifically Article I of the Fourteenth Amendment thereto, Section 10, Article I of said Constitution, and the Fifth Amendment thereto, and the decision of the Supreme Court of the State of Missouri was in favor of the validity of said statute, which decision is hereby assigned as error.
>
> "2. That the Supreme Court of Missouri erred in holding and deciding that forcing an employer to give to an hourly paid employee money for time not worked during his regularly scheduled work day, but time used by the employee so that the said employee would have the statutory four-hour period during the time the polls were open in which to vote, was not a deprivation of Appellant's property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

"3. The Supreme Court of Missouri erred in holding and deciding that forcing one class of persons, natural or corporate, to pay a member of one special group of the electorate of the State of Missouri and of the United States, for time missed from his regular employment in order to vote, did not deny this Appellant equal protection of the law contrary to Section 1 of the Fourteenth Amendment of the United States.

"4. The Supreme Court of Missouri erred in finding and holding that forcing one party to a contract to pay to the other party to a contract the hourly rate contractually agreed on between the parties to be paid for each hour the second party worked, even though the second party did not do any work during the period in question, was not an abrogation of the obligation of contracts in contravention of Section 10 of Article I of the Constitution of the United States."

## VI.

## ARGUMENT.

### A. The Current Status of the Challenged Statute.

Construing the opinion of Division 1 of the Supreme Court of Missouri as adopted by a 4 to 3 vote of the Missouri Court en banc (State v. Day Brite, 240 S. W. 2d 886), together with the opinion of the St. Louis Court of Appeals (State v. Day Brite, 220 S. W. 2d 782), we find that the Missouri Statute challenged in this Court now has the following meaning:

An employer, at his option, may designate any four consecutive hours on each and every election day during which the polls are open (6 A. M. to 7 P. M.) during which his employees entitled to vote in such election are entitled to absent themselves from their services and employment. If any part of that four-hour period as designated necessarily falls within the regularly scheduled work day, the employer must pay the employee for the time, so missed, that he would ordinarily work.

This is true, even in the case of employees contractually engaged to work by the hour at a contractually agreed hourly rate. This is true, even though, under the terms of the Union contract, the employer agrees to pay the employee $1.60 for each hour the employee works, and the employee agrees to work for the employer one hour for each $1.60 paid.

In the instant case, the employee, Grotemeyer, regularly worked until 4:30 in the afternoon. Appellant posted notices, as was its option, designating the four-hour period, from 3:00 P. M. to 7:00 P. M., as the period during which its employee who was entitled to vote would "be entitled to absent himself" from the services or employment in which he was engaged or employed.

Grotemeyer left at 3 o'clock, and, hence, worked for appellant one and a half hours less on that day than he usually worked. Appellant, under the terms of its contract with Grotemeyer's Union, did not pay Grotemeyer for this ninety-minute period during which he performed no services for the company.

Under Count 1 of the information in the case, as originally filed, the State contended that the Company violated the law, because it did not give Grotemeyer four hours' time off from his regular work day. Grotemeyer had requested from 12:30 to 4:30 (R. 10).

The St. Louis Court of Appeals (State v. Day Brite, 220 S. W. 2d 782) held the Company not guilty on this count, saying that any consecutive four hours' time during which the polls were open satisfied the requirements of that portion of the statute.

In the present case, the Supreme Court of Missouri has held that the appellant, by not paying Grotemeyer for the time from 3:00 to 4:30 P. M., violated the law, as set out in the questioned statute, in that it caused the employee Grotemeyer to suffer a "penalty or deduction of wages" because of exercising the privilege of absenting himself for four hours from his employment on election day.

The appellant, in its motion to quash the information filed in the trial court, in its motion for a new trial, filed in the trial court, in its assignment of errors and in its argument before Division 1 of the Missouri Supreme Court, in its motion to transfer the cause to the Missouri Supreme Court en banc and in its brief and its argument before the Missouri Supreme Court en banc and in its jurisdictional Statement filed in this Court, set out certain grounds in which it urged the statute was unconstitutional.

Appellant adopted its Assignment of Errors as filed in this Court (R. 70), in its Statement of Points to be re-

lied upon (R. 74). The identical grounds involving the Federal Constitution, as raised from the inception of this case, were urged in the Court below, and will be urged again here. They are, heel on toe, considered singly hereafter.

**B. The Statute Violates "The Due Process Clause".**

In the "Motion to Quash Count 2 of the Information", filed in timely fashion in the trial court, we find:

> "3. That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States, in that enforcement of the statute sought to be enforced by the information herein—namely, Section 11785, R. S. Mo. 1939, will, under Count 2 of said information, deprive this defendant of his property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States." (R. 5, 6.)

This was again urged by paragraph 3 of Appellant's "Motion for a New Trial" (R. 14), and uninterruptedly urged until the matter reached this Court. (R. 71.)

Appellant strongly contends that the statute in this particular case, under the decision of the Missouri Supreme Court, is depriving this Defendant and all other employers in a like situation of property without due process of law.

**1. Appellant is deprived of tangible property by this Statute.**

It is deprived of tangible property, that is, money that it is forced to pay to its employees for work not performed and for which appellant receives nothing. The Stipulation shows that this amount is substantial. If all employees were granted four hours off with pay from the scheduled work day it would cost appellant in this case on every elec-

tion day $951.42 by way of pay to its employees and an additional sum of $7,138.00 for loss of production. This would be a total of $8,092.42 (R. 11). No doubt it will be argued that under the holding of the St. Louis Court of Appeals the loss to Appellant would not be four hours, but only one hour and a half. This would be the still substantial sum of $3,033.52 lost to appellant by way of wages paid out for work not done and production time lost.

It is true that, in giving the four consecutive hours during the time the polls are open, for employees to vote, the production loss cannot be avoided, but when, in addition thereto, a state statute lays down a mandate that an employee must be paid by the appellant with Appellant's funds for time lost on election day when the employee may or may not exercise a citizen's duty, the Appellant is being deprived of tangible property without due process of law. No possible justification can exist for such a requirement.

In considering this case the Court perforce must bear in mind the impact upon all employers of hourly paid workers in the State of Missouri and the financial loss without due process to all such employers. Each hour allowed by the employers engaged in manufacturing industries alone in the State would deprive such employers of some $425,000 of their money without due process (R. 12). When the hourly paid employees (729,000) (R. 12) engaged in non-manufacturing industries are added to this, it will readily be seen that the loss per hour for all employers of hourly paid workers in the State will amount to better than a million dollars per hour on each election day.

It is well to bear in mind that the statute is not limited to general elections or national elections or statewide elections, but applies to any election. This means that it applies to an election for a bond issue, an election of members of a school board, or a special election of a member of a city counsel, as fully as it does to an election of a

President or a Governor of a State. There were four elections in St. Louis in 1951.

**2. Appellant is deprived of its property right to contract.**

Freedom in the making of a contract for personal employment is an elementary part of the rights of personal liberty and private property, protected by the due process clause of the Fourteenth Amendment of the Constitution of the United States. To this effect see Prudential Ins. Co. of America v. Cheek, 42 S. Ct. 516, 259 U. S. 530, 66 L. ed. 1044.

The right to make a reasonable contract is a natural property right that cannot be taken from one without due process of law. Yet this statute denies the Company that right.

**3. Appellant is deprived of the fruits of its contract.**

In addition to this right to contract of which Appellant is being deprived without due process of law in this case, it is being deprived of another type of property. This property is the intangible right of a person to receive the consideration due him under a contract. The right to occupy a building for a term of years under a contract; the right to walk across another man's property under the terms of a contract; the right to work for an employer and to receive the sum in compensation therefor provided by the contract are all property. In the instant case the employer has as its property a right, secured by contract, to an hour's work for each hour it pays its employees. Yet this statute says it shall not have, in the case of Grotemeyer (and all other of its employees entitled to vote), 1½ hours of work for which it must pay.

Appellant entered into the Labor agreements, as set out in the Stipulation (R. 11), receiving from Grotemeyer and

all its other employees belonging to the Union, the right to have them perform services for it and in exchange it had the obligation to pay them for each hour of work so performed. For the Legislature to declare under the law that the Defendant no longer has that right to receive the services of Grotemeyer for the money it must pay is to deprive the Company of property (i. e., its right under the contract) without due process of law, in contravention of the Constitution of the United States.

**4. Private property is confiscated to another's enrichment.**

The statute complained of has the direct effect of taking private property belonging to one citizen and giving it to another citizen without due process. Private property belonging to one citizen cannot be taken by Legislative enactment and be given to another citizen without due process regardless of how laudable the apparent objective may be.

> "The taking by a state of the private property of one person or corporation, without the owner's consent, to the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States (Cases cited)." Mo. Pac. Railway Co. v. Nebr., 164 U. S. 403, l. c. 417, 41 L. Ed. 489, 495.

Undeniably that is the result reached in the instant case. Money belonging to the appellant must be forfeited by it to an employee who has done nothing to earn it and who is not entitled to it, or else appellant is guilty of an infraction of the statute here questioned. Its refusal to pay has resulted in a $100.00 fine against it.

As Judge Siler states in Illinois Central Railway Company v. Commonwealth, 305 Ky. 632, 204 S. W. (2) 973:

"If we interpret the above constitutional provision correctly, it inhibits the legislative power of this state from arbitrarily passing a law taking property away from one person and giving it to another person without value received or without any contractual basis. And this inhibition still stands, regardless of the merit or glory or value or need of the person on the receiving end of the transaction. Hardly a more worthy objective could be designed than that of building a great hospital for crippled children of all creeds and colors, a marvelous, public enterprise, and yet the constitution would not sanction a law saddling the burden of such an undertaking upon the farmers of Kentucky to the exclusion of its butchers, bakers and candlestick makers. Such a law would constitute an exercise of arbitrary power over the property of that group of free men known as farmers. Its arbitrariness would lie in its unfairness and in its preferment. **The law will not countenance a public maintenance of a private enterprise. Neither should the law demand a private maintenance of a public enterprise. Voting is a public enterprise.** But if its maintenance is required by the employer group rather than by the entire, broad, general public, then that amounts to a requirement of private maintenance of a public enterprise." (Emphasis supplied.)

No reason can exist for forcing one segment of the electorate, namely, the employers of hourly paid workers, to pay another segment of the electorate, those same hourly paid workers, a compensation for exercising a right as intimately vital to the employee as to the employer.

The situation is even worse in the instant case in view of the fact that the employer has no means of ascertaining whether the employee is entitled to vote or whether he in fact does vote. As previously pointed out, the statute does not require that the employee vote. It simply provides

that any person entitled to vote at an election shall be entitled to absent himself for four hours from his services during the time the polls are open on election day and shall not suffer any penalty or "deduction of wages" for so absenting himself.

Perhaps a subsidy of all voters from the general treasury of the State of Missouri might be upheld. It might be possible to enact a valid statute that provided every voter should be paid $5.00 at every election, from the treasury of the State of Missouri, for casting his ballot. We are informed that some countries less hampered by democratic ideologies have attempted legislation that would reward with cash payments from the public coffers, those citizens who vote. (Our informant did not say whether a voter got paid for voting for dog catcher or road commissioner, or whether he receives the same pay for voting for a United States Senator as for constable of Possum Walk Township.) At the other extreme are certain fascist-minded countries that nastily fine the voter (!) for not voting. (Query: Should the fine be higher for failing to vote for governor than Mayor?). Both extremes are utterly foreign to the American concept, but the Supreme Court of Missouri has held this statute is constitutional when it provides that a certain segment of the voters shall be paid by another segment of the voters for absence from work on election day.

It would be a dangerous principle to permit a government, either state or federal, to subsidize voting. It is even more dangerous, more arbitrary and high-handed when a government attempts to subsidize a segment of the electorate by obtaining the funds to finance such operation by the discredited medieval experiment of taking money from one class and giving it to another. It is a startling proposition (stamped with the approval by the Missouri Supreme Court) that the citizens of Missouri are not in fact equal before the law, but that a subsidy from private funds should

be granted to a certain group of voters in order to enable them to receive pay for absenting themselves from their employment on election day whether they vote or not.

What price then:

> "The freeman casting with unpurchased hand,
> The vote that shakes the turrets of the land"?

It is even a more glaring instance of deprivation of property without due process when one considers that the statute in question does not require in any of its terms that the employee shall in fact vote. Public welfare may not even receive the toga bought for it by the state with Appellant's coin.

**5. The State usurps power in derogation of Appellant's vested rights.**

Still an additional factor must be considered in analyzing how the employer is deprived of its property without due process of law. Article one, Section 2, of the Constitution of the United States provides the following:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature . . ."

Section 4 provides:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators . . ."

The Constitution thus delegated to the states a limited authority in elections of members of the House of Repre-

sentatives and the Senate (particularly after the enactment of the 17th Amendment). The legislatures of the several states have the authority to designate the time, place and manner of holding elections. Certainly the Constitution of the United States can designate time, place and manner of holding elections for Federal offices. The statute here attacked does not attempt to designate the time of holding elections. It does not concern itself with the place of holding elections. It is not addressed to the manner of holding elections.

> "Many things are prerequisites to elections or may affect their outcome—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these." Newberry v. United States, 256 U. S. 232, 257, 65 L. ed. 913, 921.

Certainly a state statute that provides that in federal elections a certain group of the voters must be paid by another segment of the voters has no more to do with the manner of holding elections than the prerequisites mentioned above, and the Federal Constitutional grant to the State of Missouri, above noted, equally gives no right to the State of Missouri to control the shameful and newly conceived prerequisite of paying voters for time off taken on election day. The election in question was held on November 5, 1946, which the Court will take judicial notice was an election at which the members of the House of Representatives of the United States of America and a United States Senator were chosen (R. . . .).

Article One, Section 4 of the Constitution above quoted reserves to the Congress the power to make any regulations concerning time, place and manner of voting it deems necessary. The Congress has regulated the time of hold-

ing elections for members of the Congress by establishing the Tuesday next after the first Monday in November in every even numbered year as the day for the election of representatives. Title 2, U. S. C. A., Sec. 7. Section 1 of Title 2 provides that senators whose terms are expiring shall be elected on the last such election day immediately preceding the date of the expiration of their term.

This questioned statute was passed by the Missouri legislature as part of the Missouri "Corrupt Practices in Elections" Act (H. B. No. 273, Laws of Missouri, 1897) (R. 7, 48). Under the limitations of the Federal Constitutional grant to the Missouri legislature, and until abrogated by legislation passed by the Congress, the Missouri legislature can, in determining the manner of elections, provide against corrupt practices in holding such elections. This deals with the manner of holding elections. It can even provide all qualified voters must be given an opportunity to vote. That is corollary to the manner. But a statute that maintains that a voter must be paid by someone else when he absents himself from his employment on election day (bearing in mind that there is no provision that the voter must vote in order to be paid) has no realistic relationship to preventing corrupt practices in an election or to the manner of holding elections.

> "Not only does Sec. 4 of Article 1 authorize Congress to regulate the manner of holding elections, but by Article 1, Sec. 8, clause 18, Congress is given authority 'to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.' This provision leaves to the Congress the choice of means by which its constitutional powers are to be carried into execution. 'Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appro-

priate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution are constitutional.' M'Culloch v. Maryland, 4 Wheat. (U. S.) 316, 421, 4 L. ed. 579, 605." United States v. Classic, 313 U. S. 299, 320, 85 L. ed. 1368, 1380.

The power attempted here to be exercised by the State of Missouri is not within the scope of the Constitution. The State of Missouri is limited to regulating the time, place and manner of holding elections. Paying hourly paid employees for the time they absent themselves from work on election day has no relationship to any of these three limitations. . . Appellant is deprived of property without due process of law when a state statute forces it to pay a $100.00 fine (R. 18) because the state has usurped a power not granted to it in Federal elections by the Constitution of the United States.

("These Macedonians," said he, "are a rude and clownish people, that call a spade a spade.")

**6. Police Power sicklied o'er with the pale cast of thought.**

The Supreme Court of Missouri itself has admitted that this statute is a denial of due process.

> "It is apparent that Section 11785 is violative of the due process clauses of both the Federal and State Constitutions **unless its enactment is within the police power of the state.**" (Emphasis supplied.) State v. Day-Brite, 240 S. W. 2d, l. c. 890 (R. 40).

It then examines the question of police power and after some discussion of the cases states:

> "If the economic and physical welfare of the citizenry is within the police power of the state, then political welfare merits its protection also." State v. Day-Brite, supra, l. c. 892 (R. 44).

Police power has been exercised by the states in many situations. The Supreme Court of Missouri quotes with approval the following:

> "Judge Cooley says that the police power of a state 'embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against the state but also to establish further intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment by others,' and the courts have quoted this definition with approval many times. Finally it has been said that by means of this power the legislature exercises a supervision over matters involving the common welfare and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large." (Emphasis supplied.) (R. 43.)

This quotation, found in 11 Am. Jur., Constitutional Law, Section 247, pages 972, 973, supports appellant's contentions as fully as it supports respondent's. The employer votes on his own time or at least no expense to others. The employee votes on his own time or at least at no expense to others. This is reasonably consistent with insuring to each the uninterrupted enjoyment of his own rights.

The appellant wholeheartedly endorses the Court's declaration, "The right of universal suffrage is the attribute of sovereignty of free people. We accept as a verity that 'eternal vigilance is the price of liberty.'* For the vast

* The court could perhaps also have recalled the admonition of Benjamin Franklin, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty or safety." This is particularly apropos in view of the argument advanced in behalf of the economic welfare of the union laborer.

majority the only opportunity to exercise that vigilance is in the polling place." But nowhere does the court distinguish between a statute that guarantees the right to vote and a statute that guarantees the right to be paid for absenting one's self from one's employment on election day.

Appellant wholeheartedly accedes to the principle that every segment of the population, employee or otherwise, should be encouraged to vote by guaranteeing to him an opportunity to vote. This is a democratic principle and is indeed a universal verity, but guaranteeing pay for exercising, not the right to vote, but the right of a qualified voter to absent himself on election day is as foreign to our political heritage as would be a ballot containing only one party with a large circle if the voter wishes to vote "Ja" and a much smaller circle in which to cast a fear-ridden "Nein" vote.

The court cannot be reasoning that hourly paid workers are more derelict in the exercise of their duty of voting than other segments of the electorate. This is an immoral assumption. If the statute has as its purpose the furnishing of an opportunity for the employee to vote, no pay is necessary. The purpose of the statute is not to furnish an employee an incentive to vote. It is immoral to assume that employees in general, and the employees of the Day-Brite Company in particular, have to be subsidized as an incentive to discharge their duties or to participate in the election of men to office favorable to their interests.

Again quoting from the opinion in the Illinois Central Railway Co. v. Commonwealth, supra, we find:

> "Voting is the privilege of a free people. One of its primary purposes is to keep people free. There is no such thing as a popular election in some countries of the old world. . . ."
>
> "No group of people in America has a greater stake in its government, in its rocks and rills, in its woods

and templed hills, than ordinary working men. No group in America can be more interested in voting for a clean, righteous, free statesmanlike government than that group known as workers . . . . Let no man cease to thank his God as he looks in at the open door of his voting place, as he realizes that here his quantity, though cast in overalls, is exactly the same as the quantity of the President of the United States. There is a satisfaction and privilege in voting in a free country that cannot be measured in dollars and cents."

No one would venture to gainsay the right of a democratic state to secure to its citizens within proper limits the untrammeled privileges of exercising the franchise. Yet the Supreme Court of Missouri implies, nay, ordains, that in order to safeguard our democracy and to protect the political welfare of the state and its citizenry, qualified electors who are employed at an hourly rate shall receive pay for absenting themselves from work on election day.

It has created an immoral and unprecedented classification of voters. It has established a privileged caste of citizens—hourly paid employees who shall be compensated by another artificial caste of voters, the employers, for the privilege of absenting themselves from work on election day.

"But to allow such an exception to be engrafted on the rights of national citizenship would be to contravene every conception of national unity. **It would also introduce a caste system utterly incompatible with the spirit of our system of government.** It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship." Edwards v. California, 314 U. S. 160, 181, 86 L. ed. 119, 129. (Emphasis supplied.)

"Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded but is also a short-sighted blow at the security of property itself. **Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.** Where those rights are derived from national citizenship no state may impose such a test, and whether the Congress could do so we are not called upon to inquire." Edwards v. California, 314 U. S., l. c. 185, 86 L. ed., l. c. 131. (Emphasis supplied.)

Appellant contends that there is a vast distinction between guaranteeing all an opportunity to vote, which is the American tradition, and guaranteeing pay without work to a favored few for absence from work on election day when such payment is repugnant to our whole basic form of government. Such legislation goes beyond those rules of good manners and good neighborhood insuring the uninterrupted enjoyment of a citizen's rights "so far as is reasonably consistent with a like enjoyment of rights by others," of which Judge Cooley speaks. Such legislation is arbitrary, unreasonable, unnecessary and immoral. Police power cannot excuse these invasions of the right of due process.

It has been shown that the legislation does not insure that anyone will vote, and that it casts an unreasonable burden on the employer. To be upheld under the police power the legislation must further have a reasonable relationship to the object sought to be gained. The statute provides that an employee shall not suffer "any penalty or deduction of wages because of the exercise of such privilege (i. e., of absenting himself from his employment).

Appellant contends that the employee Grotemeyer did not suffer any deduction of wages. **He was paid what he earned.**

The words whose meanings we are here concerned with are "earnings," "salary," "wages" and "deducting" or "deduction."

> "The word 'earnings' means the fruit or reward of labor; **the price of services performed.**" Pryor v. Met. St. Ry. Co., 85 Mo. App., l. c. 372. (Emphasis supplied.)
>
> "Earning." (1) Act or process of **acquiring by labor** or receiving as compensation, or that which is earned; esp. pl., wages. (2) Pl. econ. specif., any economic good **to which a person becomes entitled for** rendering economic services. These earnings are divided into wages in the ordinary sense paid for work directly productive and earnings (or wages) of management which are a return for the organization and direction of the work of others. Webster's New International Dictionary, 2nd Edition. (Emphasis supplied.)

Earnings and wages appear synonymous.

> "Evidently the term 'earnings' following 'salary,' 'wages' is used as meaning earnings of the same nature as those particularly specified, viz., salary or wages; that is **remuneration to the employee for his services.**" Newman v. Rice-Stix Dry Goods Co., 73 S. W. 2d, l. c. 270. (Emphasis supplied.)
>
> "The word 'wages' means 'that which is pledged or **paid for work or services.**'" State v. Weatherby, 168 S. W. 2d, l. c. 1049. (Emphasis supplied.)
>
> "Wages—(1) **Pay given for labor,** usually manual or mechanical at short, stated intervals as distinguished from salaries or fees." Webster's New International Dictionary, 2d Edition. (Emphasis supplied.)

"The word 'salaries' . . . includes 'salaries, wages and per diem of the officers, employees and other expenses.'" State v. Weatherby, 168 S. W. 2d, l. c. 1049.

"Salary—(1) The recompense or consideration paid or stipulated to be paid to a person at regular intervals **for services.**" Webster's New International Dictionary. (Emphasis supplied.)

"Deduction is defined as 'that which is deducted; the part taken away; abatement.'" Pittsburgh Brewing Co. v. Dept. of Internal Revenue, 107 Fed. 2d, l. c. 1056.

"Deduction—(2) (a) Act of deducting or taking away; subtraction, as the deduction of the subtrahend from the minuend. (b) That which is deducted; the part taken away; abatement; as a deduction from the yearly rent." Webster's New International Dictionary, 2d Edition.

In connection with these foregoing definitions it is of interest to consider the definition of the common, ordinary word "reduction."

"Reduction—(1) A reducing or state of being reduced." ("Reduce—(2) To draw together; now, to diminish, esp. in bulk, amount or extent; as to reduce expenses.") Webster's New International Dictionary, 2d Edition.

By all the foregoing definitions, whether of "wages," "earnings" or "salary," the courts have uniformly held and the dictionaries have uniformly defined those words as meaning compensation for **labor performed or services rendered.** Under all the the evidence in this case the employee Grotemeyer rendered no services from 3 o'clock to 4:30 on the day in question by which he became entitled to any compensation therefor. He earned and was entitled to receive no "wages," no "earnings," no "salary." How

could this appellant have penalized the prosecuting witness by deducting something which he never earned and to which he never became entitled?

Further, under the definition, a "deduction" is a "taking away." If he never became entitled to "wages," "earnings" or "salary," it was impossible for the appellant to deduct such compensation. It is true that Grotemeyer suffered a "reduction" in the total amount his earnings would have been had he worked a full eight hours on the day in question, but his failure to work was his own voluntary act. The old maxim of "Volenti non fit injuria" could almost be applied.

The State has charged in Count Two that the defendant **deducted** from Grotemeyer's salary **the amount of his earnings** for the time he was absent from his work. If he was absent from his work he had no earnings; he was entitled to nothing. It is impossible for the defendant or anyone else to deduct anything from the sum total of nothing and thereby penalize the man who, not working, has earned nothing and has become entitled to nothing. Regardless of the validity of the Statute on Constitutional grounds, the meaning of the statute is clear. The Day-Brite Company caused this employee to suffer no deduction of wages. A reduction of wages was caused by the voluntary act of the employee in absenting himself. His wages were reduced by his failure to work the hours for which he would have been entitled to pay if he had been working. There is a vast difference in legal contemplation between a company deducting from wages illegally and a man by his voluntary act reducing the amount of pay which he would have earned if he had worked. The Day-Brite Company docked no worker's fixed periodic salary—it caused no forfeiture of wages to which Grotemeyer was entitled. Evidence of such acts would have violated the statute. Under the law and under the evi-

dence no violation by the Company of the statute was shown.

The Supreme Court of Missouri upholding the conviction of the appellant under such circumstances was a denial of due process of law in depriving appellant of its property (by means of the $100.00 fine) when the appellant in fact had committed no crime even if the statute were constitutional.

As stated supra, there must be a reasonable relationship between legislation and the object to be attained for police power to apply. There is no reasonable relationship between the time granted by the statute and the time necessary for the employee to vote. It is true that normally, the determination of the desirability of legislation is not for "judicial tribunals to avoid or vacate it upon constitutional grounds," 11 Am. Jur., Sec. 306, page 1089, but when the police power is being exercised in an unprecedented manner and in admitted violation of the right of due process, the reason and wisdom for it should be subject to scrutiny.

Grotemeyer's uncontradicted evidence (R. 10) shows that he did not need four hours to do his voting—that he needed and actually used just twenty minutes to go from his place of work to his home, which was only 200 feet from the polling place—that it only required five minutes to do his voting—a total of perhaps a bit more than twenty-five minutes all told.

He further testified that, although he was permitted by the employer to leave his work at 3:00 o'clock, he did not actually vote until 5:00 o'clock. So there were approximately two hours of time available to him before he voted and approximately two hours of time after he voted and he actually needed only five minutes to do his voting. None of the time he took from his regular work day (3:00 to 4:30 P. M.) was used or needed by him.

Then the complaining witness gave this bit of significant evidence—that he "wanted four hours from his employment, namely, from the noon hour on, TO DO CAMPAIGNING, to vote, AND TO GET OUT THE VOTE . . ." (Emphasis ours.) (R. 10.)

Thus the announced intent and purpose of the complaining witness was primarily "To do campaigning" "and to get out the vote." Approximately twenty-five minutes was needed to get to the polls from his work and to exercise his voting privilege, and leaving work at the usual time of 4:30 he could have voted and been home by five o'clock. The balance of the time "from the noon hour on" he wanted to campaign for votes and to get out the vote. This is what he wanted appellant to pay him for. This was appellant's violation.

At this point it is important to note that there is a material distinction between the privilege to vote on the one hand and the privilege of receiving pay so one can campaign and get out the vote on the other hand.

The privilege to vote is a privilege that should be fostered, and opportunity to vote should be afforded. Ample opportunity and time was afforded to this complaining witness to exercise that privilege.

But he wanted more time for an entirely different purpose, "to campaign and get out the vote." Is that a privilege which it is incumbent on the state to foster and protect? Is that a privilege which an employer can be forced to subsidize by paying for work not done? The camel has not only moved into the tent, but he has brought his wife and mother-in-law with him.

We believe this court will recognize the material distinction between those two privileges, particularly in the light of the following facts, also from the stipulation of facts: At the time of the enactment of Section 11785, R.

S. Mo., in 1897, "the average working day 50 years ago in the state was 14 to 16 hours," and the average working day now (1947) is 8 hours (R. 11).

Thus, when this action was filed in 1947, a worker was confined by his work only for about half as many hours each day as was the worker in 1897.

And this Court is aware of the fact that in 1897 there were no "good roads" and no automobiles; atom bombs or Hadacol. Access to polling places often was difficult and required much time in going to and from.

Thus, in the days before "good roads" and at times when the working day was 14 to 16 hours, there may have been some reasonable justification for a statute that afforded workers four hours while the polls were open in which to exercise his privilege to vote as the early November night fell on muddy, rutty rural roads or pale gas-lighted city cobbles. That day is long gone.

This Court is asked to pass on this case in light of the conditions as disclosed in the record, fifty years later, in 1947, when we had good roads and automobiles, and when, as this record shows, the complaining witness actually needed only 25 minutes to exercise his right to vote and when labor unions at the height of their economic power flex their brawny thews and bestride the narrow industrial, economic and political world like a Colossus.

The Missouri Court, in the majority opinion, cites with approval from the case of People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. 2d 697. The Appellate Division of the Supreme Court of New York said:

> "'An employer-employee relationship may be said to have in it such a power of dominance on the part of the employer as is capable of thwarting the wholesome exercise of the right to vote in an election. The

'fact that such abuses have occurred is historical' ". (R. 42).

"May be said" by whom? By the U. M. W.? By the A. F. of L.? By the C. I. O.? By the I. B. E. W.? What person in modern industrial America where labor sits at every conference table—on every governmental committee—when it files a brief amicus curiae in every judicial controversy touching its real or imagined interests—what person, we reiterate, would make such an unrealistic statement? The power of dominance is rightly long gone with the "yellow-dog" contract. Labor no longer needs a wet nurse.

The Missouri Court cites West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L. ed. 703. It overlooks the fact that this Court in overruling Adkins v. Children's Hospital, 261 U. S. 525, 67 L. ed. 785, 43 S. Ct. 394, stated, "the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered" was responsible largely for its reversal. Neither the Missouri Court or the New York Court in the Ford Motor Case considered the question in the light of present economic conditions—economic conditions that have intervened since the Missouri Legislature passed the statute in 1897 to prevent corrupt practices in elections.

The New York statute provides for only 2 hours, excludes primary elections, and penalizes the employer by its terms only if the employee wants the time to vote. Even in the Ford Motor Case the employer did not exercise its "power of dominance" to prevent the employee from voting. It just didn't pay him for work he didn't do.

Is there, in the light of these present economic conditions, any justification for a statute which forces an employer to pay a worker for four hours (or for any hours)

of work not rendered in every election, in order that he may absent himself from work and may or may not exercise his own inherent privilege requiring only 25 minutes?

But, piling Ossa on Pelion, is there any reasonable justification for a statute which requires the employer of 1897, or of the present day, to pay a worker for work not rendered for four hours, so that the worker may exercise his privilege of campaigning and getting out the vote? That is the question and the situation presented to this Court in the present case.

Appellant strongly contends that the statute in this particular case, under the decision of the Missouri Supreme Court, is depriving it and all other employers in a like situation of property without due process of law, and there is no reasonable basis for the exercise of police power to justify such deprivation.

We submit it is not reasonable to penalize appellant $13.60 in order that Grotemeyer may earn $2.40 "to campaign and to get out the vote". But the Missouri Court has justified the placing of this economic burden upon the employer as a valid exercise of the police power. It has justified it because the police power is frequently invoked to uphold so-called "labor legislation". The opinion mentions, among other types of legislation, workmen's compensation laws, unemployment compensation laws, semi-monthly payment of wage laws, minimum wage and hour laws, Sunday labor laws, etc. (R. 44.) It is important to note that in every one of the laws of that type the legislative intent has been clear. For example, the Fair Labor Standards Act of 1938, as amended, states the following as its Findings and Declaration of Policy:

> "Section 2 (a). The Congress finds that the existence in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum stan-

dard of living necessary for health, efficiency and general well-being of workers, etc." Pub. No. 718, 75th Cong., 3d Sess. (52 Stat. 1060), together with amendments thereto. 29 U. S. C. A., § 202.

The Fair Labor Standards Act is essentially and avowedly labor legislation, passed for the purpose of correcting certain evils that the Congress has found inherent in the body politic. It, and the other types of legislation cited in the opinion, were designed to eliminate certain evils existing in our economic system which were detrimental to the health, efficiency and general well-being of workers and, hence, offered a threat to the economic and physical welfare and safety of the public in general.

Denial of pay for absence, not needed but desired "to campaign and get out the vote" presents no threat to the health, efficiency and general well-being of workers. It is not even a threat to the economic welfare of the hourly-paid laborer. Nine hundred and fifty Union men walked out at the Oakridge Atom Plant recently because of the lay-off of eight men. They picketed the plant, and production of vital defense weapons ground screechingly to a halt. It caused great economic loss to every union man in the plant. But it was their personal right to strike, and they wittingly accepted the economic loss to uphold their personal right guaranteed to them by the law. It is equally their personal right to vote, and equally they should accept the economic loss involved in upholding this personal right. But here no economic loss is necessary—only an unmerited economic advantage—the age-old indolent's dream of something for nothing is sought.

One fears that when the Missouri Court speaks of economic welfare and police power

"Inclination snatches at arguments
To make indulgence seem judicious choice."

Paradoxically, in upholding the constitutionality of this statute in an attack from another quarter the opinion of the Missouri Court has shown conclusively that this is not and cannot be labor legislation. In discussing the constitutionality of this statute under Section 23, Article III, Missouri Constitution of 1945, the Court said:

> "In essence, therefore, the employer who practices the acts condemned by the statute, as did the defendant, is guilty of 'corrupt practices in elections,' which is the first definitive phrase of the original act" (R. 49).

The Missouri Court has held that this statute is an amendment to "An Act to prevent corrupt practices in elections," and hence the title of the original act was sufficient to embrace the provisions of this statute contained in the amendatory act. If the clear intendment of the statute was to prevent corrupt practices in election, this act cannot be justified as labor legislation designed to promote the economic welfare of employees and so subject to the exercise of police power and here justify placing a burden on the employer.

If the legislative intent was to secure free and open elections so that our democracy could be upheld, the reasoning advanced by the Court as applicable to labor legislation, such as has sustained minimum wage laws and other labor legislation, cannot sustain the validity of this statute. The statute is either fish or fowl or good red herring—a statute should not be endowed with the attributes of Proteus.

### C. The Statute Denies Equal Protection of the Laws.

Point 6 in appellant's Motion to Quash Count II of the information filed in timely fashion in the trial court provides the following:

> "That said statute is invalid and unconstitutional and contrary to the provisions of the Constitution of

the United States in that the enforcement of the statute sought to be enforced by the information herein, namely, Section 11785, R. S. Mo. 1939, will under Count II of said information deny to this defendant equal protection of the laws in violation of Section 1 of the 14th Amendment of the Constitution of the United States" (R. 6).

This point has been carefully preserved throughout the proceedings in this cause in the same manner that the point involving due process of law, supra, was preserved.

In Section 1 of the Fourteenth Amendment to the Constitution of the United States it is provided that: "No State shall deny to any person within its jurisdiction the equal protection of the laws." This has been construed to mean that a statute would be unconstitutional which selects particular individuals or a group of individuals from a class and subjects them to rules different than those to which other members of the class are subjected or imposes upon them special obligations or burdens from which others in the same class are exempt. See Cooley, Constitutional Limitations (6th Ed.), 556.

Article 8, Section 2, of the Constitution of Missouri, 1945, provides what the qualifications of voters of the State of Missouri shall be—in brief, all citizens of the United States over the age of 21 who have resided in the state one year and in the county, city or town 60 days before the election are entitled to vote. The State of Missouri under the Constitution of the United States has the right to fix the qualifications of voters within its boundaries. In a general Federal election, such as this one was, the electors, so says Section 2 of Article 1 of the Constitution of the United States, "of each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." Those qualifications are as set out above by the Constitution of the State of Missouri for 1945.

The group of residents of the State of Missouri forming the electorate includes within its membership men and women, members of the white race and members of the colored race, the millionaire and the village bum, and most significantly for the purposes here under discussion, the employer and the employee. We are considering here only the citizen's right to vote, or his right to an opportunity to vote, or in the final analysis, his right to be absent from his place of employment (if he happens to be an employee) on election day with pay.

The Constitutions of the United States and of the State of Missouri make no distinction, economically, socially, racially, or in any other regard, between classes of voters. All voters belong to one class. When, therefore, state legislation is held by the highest court of a state to mean that one segment of the voting citizenry must pay to another segment compensation for absence from their employment on election day, such provision is discriminatory and denies the employer equal protection of the laws. Police power does not extend this far.

Employers comprise a segment of the electorate that in an economic grouping would be classified as a subdivision of that economic grouping engaged in free enterprise.

> "Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law'; 'This is a government of laws and not of men'; 'No man is above the law,' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment (sic, 14th) were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted upon by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty was aimed at undue favor and individual or class privilege on the one hand and at hostile discrimination or the oppression of inequality on any other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. . . .

"Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws to the latter class as if immunity were in favor of, or the deprivation of the right permitted worked against, a larger class. (Emphasis supplied.)

"Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. Ed. 220, 226, 6th Supreme Court Reporter 1064, speaking for the court of both the due process and equality clause of the 14th Amendment, said:

> 'These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"

Truax v. Corrigan, 257 U. S. 312, 332 and 333, 66 L. Ed. 254, 263.

Attention is called to this court's pronouncement that the guaranty was intended to secure equality of protection for all similarly situated. When the question of voting arises, all people qualified to vote are "similarly situated." Voters cannot be classified into groups such as those who own cars and those who walk, those who wor-

ship God and those who worship Mammon, those who drink bourbon and those who drink tea.

The statute in question does not accomplish its purpose in a reasonable manner so as to warrant police power justifying the classification of voters into one group that employs laborers and another group that labors.

Appellant states that it is not a reasonable classification for the further reason that employers are afforded no protection against petty chiseling by the thousands of employees who are entitled to vote and absent themselves on election day and do not vote. They must be paid. It does not afford employers protection against the chiseling by thousands of employees who are not entitled to vote but who absent themselves from their employment on election day and demand pay for the time missed. There is no method by which the employer can ascertain the eligibility of his employee to vote. Indeed, the statute does not even require that the employee, even though receiving pay, shall vote. It only requires that the employee be allowed the privilege of absenting himself from work. Even in the absence of all other considerations, forcing an employer to pay an employee entitled to vote for absenting himself from his employment and not voting would be both a denial of due process and of equal protection of the laws.

The opinion of the Supreme Court of Missouri justified the statute by an extension of the police power unprecedented in Missouri and in the United States. It extends police power into the field of political welfare. Even such an extension of police power (the statute is admittedly unconstitutional absent that extension) cannot stretch its newly fledged attributes to cover forced payment to an employee not entitled to vote or to an employee who does not vote. Liberty they cry when they mean license.

If it be argued that it is to the appellant's interest that all voters vote and the protection of that interest is a fair

compensation to the appellant, the foregoing shows that the appellant is not even guaranteed directly or indirectly that ephemeral consideration. Nor does such argument take into consideration at all the undoubted facts that it is equally to the employee's interest that all voters vote, and that the employer is denied equal protection of the laws when a special burden is placed on his shoulders to secure a result equally desirable to all.

The statute denies equal protection of the laws to this appellant because nowhere by its terms does it secure to it any assurance that the clear intendment of the statute would be effected. If the statute had stated in plain terms every employee must be given time off on election day whether he voted or not, its unconstitutionality would stand confessed. That, it is submitted, is the effect of the present statute. No safeguard is afforded this appellant or any other employer that it will not be forced to pay far beyond the bounds attempted to be fixed by the statute. A statute with these defects cannot be constitutional either under due process, equal protection of the laws or the aegis of police power.

The Supreme Court has enunciated a well recognized principle that it is not its province to determine the wisdom or adequacy of a statute in passing on its constitutionality (R. 45). Appellant does not stand before this Court attacking either its adequacy or wisdom. Appellant urges that regardless of either inadequacy or foolishness there is now no reasonable relationship between the statute presently on the books and the end sought to be obtained to justify the exercise of police power. Police power, even by the "political welfare" measuring stick, newly enunciated in one Missouri opinion, cannot extend to forcing an employer to pay an employee for time taken off on election day when the employee is either not entitled to vote or does not vote. No more clearly could one be deprived of equal protection of the laws.

The right of employees to vote should be protected, but the steps taken to secure that protection must not unreasonably infringe upon the rights of another group of voters. The classification made by the statute is an arbitrary one extending far beyond the reasonable need or purpose behind the statute. Its constitutionality cannot be sustained when it so patently denies appellant equal protection of the laws.

**D. The Statute Impairs the Obligation of Contracts.**

Paragraph 8 of appellant's Motion to Quash Count II of the information filed in timely fashion in the trial court reads as follows:

> "That said Section 11785, R. S. Mo. 1939, is invalid and unconstitutional and contrary to the provisions of the Constitution of the United States in that the enforcement of said statute under Count II of said information will impair the obligation of contracts in violation of Section 10, Article I, of the Constitution of the United States." (R. 6).

This point was preserved throughout the proceedings in this matter in the same manner as the point raised concerning due process of law was preserved. Section 10, Article I, of the Constitution of the United States provides in part:

> "No state shall . . . pass any bill of attainder, ex post facto law or law impairing the obligation of contracts . . ." (Emphasis supplied.)

The employer-employee contract has, of recent years, become a highly specialized and comprehensive document. Every minute detail of the Agreement by the employees as to what their rights are to be and what are their obligations as well as the duties, obligations and rights of the employer, are carefully spelled out in these so-called Charter Agreements.

The thing the employer received by the contract was the right to have employees work for it on specified days and at specified hours. In exchange for that right, the employer obligated itself to perform a great many things—such as to employ only union members, furnish various facilities, to pay a certain scale of wages on an hourly basis for each hour's work performed, holidays, etc. There is no contention by anyone that the employer did not fully discharge the obligations under the contract; but this statute would deny to the employer the rights guaranteed to him under the contract.

Theorizing for a moment, no one would hesitate to denounce the employee who, having entered into an agreement such as the one here present, while holding the employer to the exact terms of the contract, reported for duty, not as the contract specified, but at such times as the employee chose to work. That would be a clear violation by the employee of the obligations he assumed when his Union representative executed the contract. As a matter of fact, absenteeism is one of the great causes of industrial inefficiency and is a basic reason for any employer signing a Union Contract. If the employee could not refuse to work in accordance with the terms of the contract without abrogating his obligations thereunder, it is impossible to see how a State can then pass a law which effects the same result. Yet, when the Missouri Court declared this defendant guilty of violation of Section 11785, the Court clearly accomplished that result. The statute goes even further and requires the employer to pay the employee for hours not worked, whereas, under the contract the company was obligated to pay Grotemeyer $1.60 for each hour worked, or conversely, Grotemeyer was entitled to receive $1.60 per hour only for hours worked. This statutory requirement is as much an impairment of the obligations of a contract as if the employee had done it rather than the statute accomplishing the same result.

The Supreme Court of Missouri has held in its opinion that the statute is justified in impairing the obligation of contracts. It bases that pronouncement on the opinion of the Missouri court in Gideon-Anderson Lumber Co. v. Hayes, 348 Mo. 1085, 156 S. W. 2d 898, from which it quotes as follows:

> "The power of Government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is **reasonably calculated** to injuriously affect the public interests." (Emphasis supplied.) (R. 47.)

A most careful reading of the union contract fails to disclose how it is **reasonably calculated** to injuriously affect the public interests. It is a standard contract providing in somewhat lengthy terms the conditions of employment, including the rate of pay for work performed. A contract providing that Grotemeyer shall receive $1.60 for each hour worked could not conceivably injuriously affect the public interests. Assuredly contracts may be regulated so as to require suitable protection of health, safety, minimum working conditions and pay. They can be regulated to prevent oppression, but the present statute is aimed at none of these things. Unregulated, the contract here involved cannot affect the public welfare, health, morals or interest. It simply fixed the terms of employment of Grotemeyer. He is to work one hour for which he is to be paid $1.60. To take money from the employer and give it to Grotemeyer for work he does not perform relieves the employee of the obligation of his contract and abrogates the appellant's contractual rights without justification and in derogation of the Constitution of the United States.

Since the exercise of the vote is a privilege guaranteed to every citizen of this country, every citizen has not only a right but a duty to exercise a vote. The employee's interest in Government ought to be great enough for him to vote

without subsidization therefor by his employer and at his employer's expense. It is not reasonable to say that an employee in the discharge of a moral civic duty, and while exercising a legal right, must do it at his employer's expense and to the impairment of his working agreement. "Where a statute manifestly varies the contractual obligation between an employer . . . . employee, it must be based on some valid and necessary exercise of the police power of the State and not be an arbitrary restriction." State v. Savings & Building Association, 167 Mo. 489, 67 S. W. 215.

Evidence worthy of notice is found in paragraphs 11, 12 and 13 of the Stipulation wherein Jacobs, one of the witnesses for the State, disclosed what obviously was a studied plan to use this Statute of 1897 to exact pay for work not rendered—a premeditated plan to get something for nothing (R. 11).

Jacobs was International Vice-President of the International Brotherhood of Electrical Workers and had been [illegible] for 30 years (R. 10, 11).

Jacobs admits that never before had his **union** made a demand on this employer for four hours off with pay (R. 11), and yet "on the day prior to the election he had discussed with Mr. Wilks, Plant Superintendent for the Defendant, the question of **union** members being allowed **four hours off from their normal work day**, with pay for the time not worked, for the purpose of voting during the election" (R. 10). (Emphasis supplied.)

Then on the same day Grotemeyer, a member of the **union**, "requested permission . . . . from one Wilks, Plant Superintendent for the Defendant, to absent himself for a period of four hours from his scheduled work day the next day to vote, and that Wilks refused him such permission" (R. 9).

With only 25 minutes actually needed for voting, what purpose was in mind except an effort to make the employer pay for the time not used in productive work for his employer, but for time this union man wanted to use in campaigning and getting out the vote?

As heretofore shown, the prosecuting witness admitted that this was his purpose, that he wanted time off from noon on, for that purpose. He wanted four hours pay from his employer for campaigning and getting out the vote.

And, in the concerted union effort, the purpose was to secure pay for all union employees for work they did not do.

This is not an attack upon unions as such. It is an impeachment of the motives of a few men belonging to a particular union. They are making an unblushing effort to escape the solemn obligations of their contract, namely, to work one hour for each hour's pay received, and they appeal to the authority of this Court to aid them in that evasion of their contractual duties. The highest court in this great country should not countenance such an attempt, and, under a broad or narrow interpretation of Section 10, Article I, of the Constitution of the United States, this Court cannot countenance such an attempt.

No valid exercise of the police powers of the State can be found in arbitrarily saying that regardless of a contract, work not done on an election day must be paid for, because the employee would have earned the amount sought if he had worked and had not chosen to absent himself to campaign, to vote and to get out the vote.

As Judge Vandeventer said in his dissenting opinion in State v. Day-Brite, supra, l. c. 903:

> "When it entered into its contract with the employee whether actually written into it or not, that

contract included the provisions of all valid material statutes. 17 C. J. S., Contracts, Section 300 . . . but to take money from the pockets of the employer, whether it be $2.40 for an hour and a half or the same sum multiplied by the number of its employees, is taking the property of one segment of society and giving it to another without anything in return, and this without considering the immoral aspect of paying an employee for exercising his privilege and duty to vote. **That part of the statute was unconstitutional and did not become a binding part of the contract.**" (Emphasis supplied.) (R. 65.)

A contract would be valid if it provided that on election day an employer would pay the employee double time for the time he would be entitled to absent himself instead of single time if he took the time off. The employee could waive the right. If he does not apply for time off but works, the employer is not in violation. It is not compulsion on the part of the employee to take the time off. If he is a conscientious employee who believes in working for money earned and does not want to be beholden to anyone—if he is paid double time to work instead of taking the time off, he has waived the provision of the statute. Absenting himself is entirely at the option of the employee. He can take the time off—or he can work at the contractual rate or double the contractual rate—there is no compulsion on him to vote or even take the time off.

Legislation that provided an employee had to take the time off without pay to vote would be class legislation. It is equally class legislation when the employer has to pay the employee for taking time off on election day.

One is not unmindful of the argument that all valid statutory provisions are included in a contract whether actually written into the contract or not. That argument applies equally to both contracting parties. It applies

here to the employee as well as the employer. Since the provisions of the statute could be waived (e. g., the employee could have received double pay—or stayed and worked), when the contract was silent on the question, the right to receive pay (if such a right ever existed) was waived. The state now seeks to engraft upon the contract something other than the contracting parties agreed on and had a right to agree on. (They could have agreed that on election day union members should report two hours early so that four hours would remain at the end of the day before the polls closed. Such an agreement would have been valid.) There is no provision in the statute making illegal a contract such as these mentioned. The Missouri Court voids part of the contract as written. This, it is submitted, it cannot constitutionally do under the facts in this case without abrogating the obligation of contracts.

### E. Decisions in Other States.

To date four states other than Missouri have had some phase of the present question passed on by their highest appellate court or some court of appellate jurisdiction.

Some sixteen states make it unlawful for employees to be docked under varying circumstances. Colorado and Utah specifically exempt hourly paid employees from operation of the statute. Six other states provide for absence of employees on election day with no provision for payment of wages. (See Table in C. C. H. Labor Law Journal, May, 1950.)

The four states who have passed in some degree on the question are Illinois, Kentucky, New York and California. The cases that should be considered are as follows:

People v. Chicago, Mil. & St. P. R. R. Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610;

McAlpine v. Dimick, 326 Ill. 245, 157 N. E. 235;

International Shoe Co. v. Caldwell, 305 Ky. 632, 204 S. W. 2d 973, Cert. den. 92 L. Ed. 1767, 334 U. S. 843, 68 S. Ct. 1511;

People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697;

Kouff v. Bethlehem-Alameda Shipyard, Inc. (Cal. App.), 202 Pac. 2d 1059;

Lee v. Ideal Roller & Mfg. Co., 92 N. Y. S. (2) 276;

Ballarina v. Schlage Lock Co. (Cal.), 226 Pac. (2) 771.

The two Illinois cases and the Kentucky case seem squarely in point factually with the present case. Rarely is a litigant's cause aided so pertinently and absolutely by judicial pronouncement as this appellant's position is aided by Judge Vandeventer's dissent from the holding of the Missouri Court. He analyzes those three cases in a manner far superior to any attempt by this appellant to do so.

He states:

"So far as we have been cited, or I have been able to find from an independent investigation, the first and leading case in the United States directly on this question is the case of People of the State of Illinois v. Chicago, Milwaukee and St. Paul Railway Co., 300 Ill. 486, 133 N. E. 153, 24 A. L. R. 610. An annotation at the end of that case in A. L. R. confirms my opinion that it is a case of first impression. In that case the Supreme Court of Illinois had under consideration a statute almost identical with the one before us except it permitted the employee two hours absence instead of four. That Court said:

"'Under our state and Federal Constitutions every person is guaranteed the equal protection of the law in the right to own, use, and enjoy property. These Constitutions also distinctly provide that the property of no person shall be

taken unless compensation be given to him for such invasion of his rights. Any law that deprives any person of his property or compels him to deliver to any person his property without justification deprives him of property without due process of law. This section of the statute above quoted violates the provision of our Constitution aforesaid by providing, in substance, that no deduction from the usual salary or wages of the employee shall be made by his employer on account of such absence, and by subjecting the employer to the penalty aforesaid in case he makes such deduction from the employee's wages. There is no justification or sound reason to be found in the law for making such a discrimination between an employer of labor and other persons who do not employ labor, and it likewise is a clear violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. The legislative branches of this government and of this state have gone to the utmost limits in legislation to protect the lives, health and safety of employees, and the courts of this country, including this court, have also gone far in sustaining those laws wherever and whenever it reasonably appeared that such laws were necessary or beneficial in protecting the lives, health, and safety of such employees while at work, without regard to the question of cost to employers. The same courts have gone equally far in sustaining laws that guarantee the equal and unhammeled rights of every citizen to exercise his right of franchise and to cast his vote at every election as he pleases and for whom he pleases, and without hindrance or undue influence of any kind by any person; but, so far as we know, no court has ever decided in any case that

it was the right of any citizen, under any circumstances, to be paid for the privilege of exercising his right to vote, or to be paid by his employer for the time employed by him in the exercise of his right to vote. The statute in this case, in substance, requires employers of laborers to pay them for two hours' time while exercising their right to vote, and thus deprives such employers of their money and property without due process of law, and thereby denies them the equal protection of the laws, in violation of both the Federal and State Constitutions.'

"The State of Illinois, in this case argued, as is argued here, that this statute was a valid exercise of the police power but that contention was considered by the court and it said:

'It is true that the state does have the right, under its police powers, to pass laws that tend to promote the health, safety, or morals of such employees as Turney, because of the fact that such laws would tend to promote the health, comfort, safety, and welfare of society. The act in question, as contended by plaintiff in error, does not in any way, so far as we are able to see, tend to promote the health, safety, or morals of such employees. The provisions in question are not adapted to the object for which the law was enacted, and cannot be said to secure public comfort, welfare, safety, or public morals. There is no contention, and there can be none made with any reasonable showing, that the provision in question tends to promote the safety or health of any employee. It has always been the policy of our laws to condemn the idea of any voter being paid for exercising the privilege of an elector or voter. The right to vote is simply one of the

privileges guaranteed to every citizen of this country who possesses the requisite qualifications. It is not only a right, but should be regarded as a duty of the citizen, where he is reasonably able physically to perform that duty. It is not the constitutional right of any citizen to be paid for the exercise of his right to vote, and the holding of the provision of the statute void does not violate the right of any citizen, including those who are employed to labor. This provision of the statute is not sustainable under the police power of the state, and it does violate the constitutional provisions aforesaid, and therefore must be declared void. Besides, "no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection" of the laws, and it should not "override the demands of natural justice."'

"In the case of McAlpine v. Dimick, 326 Ill. 245, 157 N. E. 235, the question was again before the Supreme Court of Illinois and that court reaffirmed its doctrine in People v. Chicago, Mil. & St. Paul Railway Co., supra, saying:

"'The provision of section 7, giving employees the right to absent themselves from their employment for two hours on election day for the purpose of voting without any deduction from their salaries or wages on account of such absence is also unconstitutional, being a violation of section 2, article 2 of the Constitution.'

"If it was unconstitutional then, it is now. The constitutional provision and the statute remain the same. A valid exercise of the police power cannot transcend the Constitution.

"In Zelney v. Murphy, 387 Ill. 492, 56 N. E. (2) 754, which was a suit for unemployment compensation, the court mentioned the case of People v. Chicago, Milwaukee and St. P. R. R. Co., and said:

> 'The statute there, as questioned, provided a penalty for any employer who made a deduction in wages for a period of two hours used by such employee in voting at any general or special election and the court held that it was not the constitutional right of any citizen to be paid for the time consumed in exercising the right to vote. The court further said: "No exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process and equal protection" of the laws. This holding was approved in McAlpine v. Dimick, 326 Ill. 240, 157 N. E. 235. However, this statute, re-enacted and amended from time to time, still contains this provision providing for the right of any citizen to be paid for the time consumed in exercising his right to vote. These cases, of course, could not be controlling as to the statute under consideration here and especially in view of the growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.'

"The fact that the statute has been re-enacted and amended, placed and maintained, on the statute books and apparently never enforced, does not make it constitutional. The statute in this state was enacted more than 50 years ago and the fact that there are no decisions on it until now does not inferentially or otherwise tend to prove its constitutionality. More likely it proves that there has never been any attempt to enforce it. The case at bar seems to be the first

one, as far as the books show, where this State has endeavored to punish an employer for refusing to pay an employee under these circumstances. And I can find no attempt on the part of any employee to collect such, as it appears to me, unrighteous compensation. I had rather believe that absence of precedent is due to the fact that the workers of Missouri have resented the legislative implication that they will not exercise that privilege of free men without being paid for it. I had rather think that in their scales the right to vote outweighs a few hours pay.

"In Illinois Central Railway Company v. Commonwealth, 305 Ky. 632, 204 S. W. (2) 973, the same question was up and that court held it unconstitutional both under the Kentucky Constitution and the Constitution of the United States. As I read that opinion, it did not base its decision upon The People v. Chicago, Milwaukee, St. P. R. R. Co., supra, but after it had discussed the statute, its reasons for holding it unconstitutional, and then declaring its unconstitutionality under the Kentucky Constitution, it said this:

> "'We also believe that the wage-payment-for voting-time provisions of this statute are antagonistic to the United States Constitution, particularly that provision which says that no state shall deprive any person of his property without due process of law or deny to any person in its jurisdiction the equal protection of the law.
>
> "'So far as we know, there has been only one case of this exact character decided by any court of last resort in the United States. The holding of that case was that such a law as this one now under consideration, passed by legislative authority in the State of Illinois, could not meet constitutional standards and must accordingly fall in the face of the fundamental restrictions of organic

law. See People v. Chicago, M. & St. P. Ry. Co., 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610.

"It seems to me that this question here boils itself down to this proposition, can the legislature, without violating the provisions of the Constitution, compel an employer to pay wages to his or its employee for four hours, or any other amount of time, that he absents himself on election day and for which he gives his employer no service?" (R. 55-60.)

It will be noted that this court refused certiorari when petitioned by the State of Kentucky in the Kentucky case.

Judge Vandeventer then turns his attention to the two California and two New York cases. Again his analysis is flawless.

"There are also cases which seem to hold that such statutes are justified as a valid exercise of police power. . . . The cases to the contrary in my opinion are not as well reasoned and logical as the ones above referred to.

"In People v. Ford Motor Co., 271 App. Div. 141, 63 N. Y. S. (2) 697, the company was convicted and fined $100.00 on each of three counts for subjecting employees to a reduction of wages because of absence from work, while exercising the privilege of attending an election.

"The majority opinion did not discuss the constitutionality of the statutes. It was discussed, however, in a lengthy and well reasoned dissenting opinion by Lawrence, J., and at the close of that opinion he said:

"'So far as any case has been brought to my attention and so far as I have been able to discover, no court has decided that it is the right of any voter, under all circumstances, to be paid for

the privilege of voting. The statute here requires employers to pay their employees for two hours of time while exercising the right to vote, whether that is necessary or not, and thus deprives them of their property without due process and denies them the equal protection of the law, in violation of both the federal and state constitutions.'

"In Kouff v. Bethlehem-Alameda Shipyard, Inc. (Cal. App.), 202 Pac. (2) 1059, the question before the court was the legality of the discharge of an employee because he had taken off time to serve as an officer of election on election day. It was held that the statutory requirement was not unconstitutional. The court cited and discussed People v. Chicago, M. & St. Paul R. Co., supra, and Illinois Central R. v. Commonwealth, supra, and said:

> "'It is interesting to note that both cases concede that that part of the statute requiring employers to allow time out to vote—2 hours in Illinois and 4 in Kentucky—is a proper exercise of power. It was for a violation of the part requiring full pay that both railroads were prosecuted. Although those cases deal with time out for voting, while this deals with time out for election-board service, there is no essential difference between the statutory language in those cases and that of section 696, viz., "nor shall any deduction be made from his usual salary or wages." However, it is not necessary for us to express any opinion as to the constitutionality of the part of section 695 just quoted. It suffices to say that it is clearly separable from the dismissal provision. See 12 Ca. Jur., pp. 643, 644. If the state can prevent employers from discharging employees because they serve on election boards, it follows that

the complaint states a cause of action for unlawful discharge.'

"In the case of Lee et al. v. Ideal Roller & Mfg. Co., 92 N. Y. S. (2) 276, the cause was tried in the municipal court, Scileppi, Justice, presiding. The facts in that case were dissimilar to the one here. In that case an employee had worked 38 hours in a week and had been paid for 40 hours because of two hours off on election day. He was then called upon to work 4 more hours on Saturday after he had only worked 38 hours but had been paid for 40. Under a union contract for overtime above a 40-hour week, he was to receive time and one-half. He contended that the two hours for which he was paid and did not work should be counted in the 40-hour week so he could get time and one-half for the full four hours worked on Saturday. His employer contended otherwise but Scileppi, Justice, held for the employee and rendered judgment against the defendant for the 4 hours worked on Saturday at overtime wages. No case is cited in the opinion as authority, no constitutional question was discussed and the only issue was whether to count the two hours that were paid for that were not worked in the 40-hour week so the full four hours on Saturday would be paid at the overtime rate. In its opinion, Scileppi, Justice, said:

> "'It is conceded by the defendant that if the plaintiffs had actually worked eight hours on Election Day, with two additional hours off to vote, the plaintiffs would be entitled to two hours pay at overtime rate for that day.'

"This case is therefore not in point here.

"In Ballarina v. Schlage Lock Co., 226 Pac. (2) 771, the Appellate Department, Superior Court, City and County of San Francisco, California, was consider-

a statute in all essentials the same as ours. This statute had been enacted in 1881 and until November, 1950, had never been before the courts. It permitted every voter at every general, direct primary or presidential primary election to be absent from his employment for two consecutive hours between the time of opening and the time of closing the polls. It provided that he should not be liable to any penalty, 'nor shall any deduction be made on account of any such absence from his usual salary or wages.' This case never pretended to separate the two elements of the statute, that is, the right to be absent and the right to be paid. It merely stated that when persons enter into a contract, all material statutes affecting it are read into the contract by law. That, in the abstract, is a true statement but it has this exception, that it does not apply to an unconstitutional statute or part of one. The court then held that this statute taken as a whole was a valid exercise of police power and became a part of every contract entered into between employer and employee after its enactment'' (R. 62-64).

The Ballarina case was a civil action to recover the wages allegedly due, not a criminal prosecution. Aside from that one clarifying statement it would be presumption on Appellant's part to attempt to modify, amend or expand Judge Vandeventer's analysis.

## VII.

## CONCLUSION.

For more than five decades the statute here before this Court lay dormant in the statute books of Missouri. Its sleep was undisturbed through five revisions of Missouri's code. It was fondly regarded as a shield and a buckler hanging, burnished and ready, on the bulwarks of democ-

racy to be donned if ever a citizen's right to vote should be refused. The warders of the tower never reckoned that a time would arise when the right to vote would be advocated synonymous with the right to be absent on election day with pay.

But out of the fetid sewers a feckless few, self-seeking and short-sighted, have raised an immoral demand. Nay, more than a demand—a threat. If hourly-paid workers are not compensated by other private citizens for exercising the heritage of Yorktown and 150 years of liberty, they will not vote, and democracy will falter.

The shield has now become a lance levelled by this immoral suggestion at the bulwarks it was once designed to defend. For, if any group of citizens have to be paid for balloting, that which was before us lies behind us and no tree stands where it stood before.

Repulsive is the thought that a qualified free American could be denied his franchise. Equally loathsome is the alien idea that one segment of the electorate needs pay to encourage its participation.

The serpentine statute here invoked goes beyond the $2.40 not earned by Grotemeyer, it transcends the denial of due process, equal protection of the laws and obligation of contracts—sturdy fundamental constitutional guarantees all.

American citizenship is the proudest legacy one can claim, be he tenant farmer or industrialist or skilled artisan. No law should prostitute the ballot of any citizen or group of citizens by patronizingly bestowing upon them a few paltry pennies for exercising a proud prerogative. A ballot should not be bartered—it should not be subsidized. "Take heed what thou dost. This man is a Roman."

The statute before this court, viciously undermining the roof tree of our freedom, must perforce be unconstitutional.

Respectfully submitted,

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